UNITED STATES BANKRUPTCY COURT
Eastern District of Tennessee
Winchester Division

In re

Harlan Delter Tenpenny

Debtor

Bankruptcy Case
No. 91-15035

Janie Tenpenny

Plaintiff

v.

Harlan Delter Tenpenny

Defendant

Adversary Proceeding
No. 92-1037

Appearances: Susan N. Marttala, Marttalla & Marttala, McMinnville, Tennessee, Attorney for Plaintiff

Keith S. Smartt, Smartt & Dorris, McMinnville, Tennessee, Attorney for Defendant

R. Thomas Stinnett, United States Bankruptcy Judge

The plaintiff, Ms. Tenpenny, has filed a motion to re-open this adversary proceeding. She and the defendant, Mr. Tenpenny, were divorced in the Circuit Court of Warren County, Tennessee. The divorce decree incorporated a marital dissolution agreement that required Mr. Tenpenny make certain payments to Ms. Tenpenny. Mr. Tenpenny filed a bankruptcy case in this court and received a discharge of his debts. However, § 523(a)(5) of the Bankruptcy Code provides that support debts to an ex-spouse, such as Ms. Tenpenny, cannot be discharged. 11 U.S.C. § 523(a)(5). Ms. Tenpenny brought this suit to determine which of Mr. Tenpenny's debts under the divorce decree and marital dissolution agreement were not discharged. The case was never tried in this court, and this proceeding was closed. That came about as follows.

After Ms. Tenpenny filed her complaint in this court, there were matters concerning the divorce still pending in the Circuit Court of Warren County. Judge Kelley stayed this proceeding while the parties continued to litigate in the trial court. Judge Kelley's order reveals his thinking that the divorce decree was not final with regard to the division of property and debts, or even if it was final, the outcome of the litigation in the trial court might alleviate the need for this proceeding. Judge Kelley's order provided that this proceeding would remain open for one year so that either party could raise any bankruptcy issues that needed to be raised. Neither party took any action in this court within the year. They chose to try the question of dischargeability in the state court. This proceeding was closed in April 1994, almost 18 months after Judge Kelley's order.

In the meantime (in June 1993) the state trial court entered its decision with regard to the dischargeability of Mr. Tenpenny's debts under the divorce decree. Mr.

Tenpenny appealed. The Tennessee Court of Appeals reversed and denied a rehearing. On July 3, 1995 the Tennessee Supreme Court denied further review. Ms. Tenpenny then filed a motion to re-open this adversary proceeding. She contends the state court litigation did not result in a decision on dischargeability under § 523(a)(5), and therefore, this proceeding should be re-opened. Specifically, she relies on Rule 9024 as grounds for relief from the order closing this adversary proceeding. *Fed. R. Bankr. P.* 9024; *Fed. R. Civ. P.* 60. Mr. Tenpenny contends the state courts have decided the dischargeability issues in his favor, and under the rules of res judicata and collateral estoppel, their decisions are binding on Ms. Tenpenny and this court.

The court's discussion must begin with the exception from discharge in § 523(a)(5) of the Bankruptcy Code. 11 U.S.C. § 523(a)(5) & § 727(a). For convenience the court will use "support" to include alimony and maintenance and "divorce decree" or "decree" to mean both the decree and the marital dissolution agreement that it adopted.

Section 523(a)(5) provides that the discharge of debts in a bankruptcy case does not discharge debts to an ex-spouse that are actually in the nature of support. The labels used by the divorce decree do not control. An obligation that the decree labels as alimony, maintenance, or support will be discharged if it is not actually in the nature of alimony, maintenance, or support. 11 U.S.C. § 523(a)(5)(B). Likewise, a debt may be excepted from discharge on the ground that it is actually in the nature of support even though the divorce decree labels the debt as something else. *Singer v. Singer (In re Singer)*, 787 F.2d 1033 (6th Cir. 1986). In summary, under § 523(a)(5) a court must decide

which debts under the divorce decree are actually in the nature of support for the ex-spouse.

In the leading case of *In re Calhoun* the United States Court of Appeals for the Sixth Circuit laid down some basic rules for deciding cases under § 523(a)(5). *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103 (6th Cir. 1983). In *Calhoun* the Sixth Circuit was concerned with the debtor's obligation to pay debts to third parties. The Sixth Circuit established a three step test for deciding whether such obligations are actually in the nature of support and therefore excepted from discharge. First, the court must determine whether the parties and the state court intended the obligation as support. Second, the court must determine whether payment of the debt actually has the effect of providing support. Third, the court must determine whether the amount the debtor was ordered to pay is so excessive that it is manifestly unreasonable under traditional concepts of support. *Id.* at 1109-1110.

The order entered by the Circuit Court of Warren County provided as follows:

> B. With regard to the Marital Dissolution Agreement executed by the parties and entered with the Court on March 23, 1990, Paragraph 1, subparagraphs (e), (f), (g), (h) and a second paragraph designated (g), it was the intention of the parties at the time the Agreement was entered that the sum of $450.00, even though designated in part as partial consideration for the Wife's interest in the parties' marital property, was intended by the parties to be used for the maintenance and support of the Petitioner, and therefore, is in the nature of alimony.
> . . . .
>
> 1. Petitioner's Petition to Modify the Final Decree is granted insofar as to clarify that $450.00 of the amount owed

> to Petitioner by Respondent in Paragraph 1, Subparagraphs (e), (f) and (g), even though designated as partial consideration for the Wife's interest in the parties' marital property, was actually in the nature of maintenance and support for Petitioner and should therefore be designated as alimony. Further, in Paragraph 1, subparagraphs (h), the sum of $200.00 per month which is designated as partial consideration for the Wife's interest in the parties' marital property is actually in the nature of support and maintenance for the Petitioner and therefore should be designated as alimony.

The order dealt with the intent of the parties when they entered into the marital dissolution agreement and with whether some of the debts that were designated as payments for property were actually in the nature of support. This suggests the trial court decided the case under § 523(a)(5) as explained by *Calhoun*.

On the other hand, the trial court's order did not mention the debts specifically labeled in the divorce decree as alimony and child support. The order did not say whether they were excepted from discharge. Indeed, the order did not expressly declare any debts to be either discharged or excepted from discharge under § 523(a)(5). The order modified the divorce decree to re-designate some of the debts that were originally identified as payments for property as alimony.

The appeals court viewed the modification of the divorce decree as raising a question concerning the authority of the state courts when deciding cases under§ 523(a)(5). Does the authority of the state courts to decide cases under § 523(a)(5) give them the power to amend divorce decrees in situations where Tennessee law would not allow the amendment?

After stating this question, the appeals court quoted the first test set forth in *Calhoun* and then the first sentence from footnote 10. The two quotes can be combined to say:

> We believe that the initial inquiry must be to ascertain whether the state court or the parties to the divorce *intended* to create an obligation to provide support . . . . We recognize that such inquiry may, in effect, modify a judgment or decree of a state court.

Long v. Calhoun (In re Calhoun), 715 F.2d 1103, 1109-1110 (6th Cir. 1983). The appeals court then stated that the "inquiry" that may result in modification of the divorce decree means an inquiry by the bankruptcy court, not the state court.

Calhoun implied the power under § 523(a)(5) to modify divorce decrees on grounds usually left to the state courts. *Calhoun* seemed to say, "Even though an obligation was intended as support, the court can discharge the debt for future payments (not arrearages) based on changes in the parties' circumstances after entry of the divorce decree." In footnote 10 the Sixth Circuit said that this inquiry into changed circumstances could result in modification of the decree. The Sixth Circuit had already stated that the inquiry into intent should not result in modification of the divorce decree.. *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109-1110 (6th Cir. 1993) (no basis for the bankruptcy court to create a support obligation that the state court or the parties did not intend).

In Mr. Tenpenny's case the appeals court was not concerned with whether the trial court, relying on *Calhoun*, had modified the divorce decree based on changed

circumstances. The trial court did not base its decision on changed circumstances. It relied on the parties' intent when they entered into the marital dissolution agreement. Furthermore, the Sixth Circuit had already limited the *Calhoun* decision so that this particular problem no longer existed; *Calhoun* does not allow discharge of support debts based on changed circumstances because that would interfere with state control over domestic relations matters. *Fitzgerald v. Fitzgerald (In re Fitzgerald)*, 9 F.3d 517, 520-21 (6th Cir. 1993).

The appeals court also did not mean to say that every decision under § 523(a)(5) is a modification of the divorce decree. The court pointed to its earlier decision in *Hale v. Hale* as a decision under § 523(a)(5) that did not involve modification of the divorce decree. *Hale v. Hale*, 838 S.W.2d 206 (Tenn. App. 1992).

Why, then, did the appeals court say the inquiry into intent may result in modification of the divorce decree? The appeals court acknowledged that § 523(a)(5) may give the federal courts the power to modify divorce decrees. The appeals court then decided that § 523(a)(5) does not give the state courts any greater authority to modify divorce decrees than they have under state law. This summary of the appeals court's opinion does not reveal any serious problems. But there is another view of the reasoning that does raise a serious question.

The trial court had re-designated some debts as alimony. The appeals court might have reasoned as follows:

> (1) Re-designating the debts as alimony was nothing more than declaring them to be non-dischargeable under § 523(a)(5);
>
> (2) Declaring the debts to be non-dischargeable alimony amounted to modifying the divorce decree, since it unambiguously designated the debts as payments for property;
>
> (3) A federal court might have the power to do this under § 523(a)(5) without regard to the rules of Tennessee law as to when a divorce decree can be modified, but a state court's power is limited by Tennessee law;
>
> (4) Since Ms. Tenpenny did not prove any ground under Tennessee law for modifying the decree, the trial court lacked the power to declare the re-designated debts to be non-dischargeable alimony.

The appeals court did not discuss the first and second points — whether the trial court's order amounted to declaring the re-designated debts to be non-dischargeable and whether declaring the debts to be non-dischargeable amounted to a modification of the divorce decree. This discussion was not needed since the trial court's order expressly modified the divorce decree and was unclear as to whether it was intended to except any debts from discharge. The trial court's order even failed to mention the dischargeability of the debts the decree designated as alimony and child support. Faced with this order, the appeals court went straight to the question of whether Ms. Tenpenny proved any ground under Tennessee law for modifying the divorce decree. Because she did not, the appeals court reversed and vacated the trial court's order.

The appeals court did say that since the decree was unambiguous, the parties' testimony and other extrinsic evidence could not be used to prove that the re-designated payments were intended as support.[1] But the appeals court was dealing with grounds under Tennessee law for modifying the decree. It was not dealing with the question of whether any of the debts could be excepted from discharge under § 523(a)(5).

Thus, the decision of the appeals court was not a decision on dischargeability under § 523(a)(5). *See Dennis v. Dennis (In re Dennis)*, 25 F.3d 274, 278-279 (5th Cir. 1994) *cert. den.* 115 S.Ct. 732, 130 L.Ed.2d 636 (1995); *Brody v. Brody (In re Brody)*, 3 F.3d 35, 39 (2d Cir. 1993). The appeals court reversed because the trial court did not have the authority under Tennessee law to grant the remedy it did, namely modification of the decree.

---

[1]An earlier case raises the question of whether the Tennessee courts must follow Tennessee's parol evidence rule in cases under § 523(a)(5). *Hale v. Hale*, 838 S.W.2d 206, 208-209 (Tenn. App. 1992). The federal courts allow extrinsic evidence despite the parol evidence rule. *Brody v. Brody (In re Brody)*, 3 F.3d 35, 38-39 (2d Cir. 1993); *Sampson v. Sampson (In re Sampson)*, 997 F.2d 717, 722 (10th Cir. 1993); *Gianakas v. Gianakas (In re Gianakas)*, 917 F.2d 759, 762 (3d Cir. 1990); *Long v. Calhoun (In re Calhoun)*, 715 F.2d 1103, 1109 (6th Cir. 1993); *Singer v. Singer (In re Singer)*, 787 F.2d 1033. 1037 (6th Cir. 1986). As a result of changes in divorce law, the use of the parol evidence rule by the state courts could lead them to discharge a great number of support debts. Under modern divorce law, the parties and the court are less likely to label an obligation as alimony, maintenance, or support and more likely to make support an integral part of the property division. *Jana B. Singer, Divorce Obligations and Bankruptcy Discharge: Rethinking the Support/Property Distinction*, 30 *Harv. J. Legis.* 43, 68-89 (1993); *Sheryl L. Scheible, Defining "Support" Under Bankruptcy Law: Revitalization of the "Necessaries" Doctrine*, 41 *Vand. L. Rev.* 1, 16-18 (1988); *see also* 11 U.S.C. § 523(a)(15). If the state courts must exclude extrinsic evidence in situations where the federal courts would allow it, then the location of a dispute in state or federal court can make a great difference to the outcome. This may not be allowable under § 523(a)(5); the state courts may not be free to apply state parol evidence rules and other similar rules in disputes under § 523(a)(5). *Felder v. Casey*, 487 U.S. 131, 108 S.Ct. 2302, 101 L.Ed.2d 123 (1988).

This leads to the result that the state court decisions do not bar Ms. Tenpenny from litigating the dischargeability issues in this court. The doctrines of res judicata and collateral estoppel do not apply because the trial court judgment was vacated. 28 U.S.C. § 1738; *Merchants & Manufacturers Transfer Co. v. Johnson*, 55 Tenn.App. 537, 403 S.W.2d 106 (1966); *Hinton v. Robinson*, 51 Tenn.App. 1, 364 S.W.2d 97 (1962). In summary, there is no binding decision by the state courts under § 523(a)(5) regarding the discharge of Mr. Tenpenny's debts under the divorce decree. The issues can still be tried and decided in this court.

Ms. Tenpenny has relied on Bankruptcy Rule 9024, which adopts Rule 60 of the Federal Rules of Civil Procedure. Rule 60 allows a court to grant relief from a final judgment, order, or proceeding. For the purpose of argument, the court assumes the order closing this adversary proceeding was a final order.

Paragraph (a) of Rule 60 does not apply to the facts of this case. Likewise, subparagraphs (1) through (5) of paragraph (b) do not fit the facts of this case. In this situation Rule 60(b)(6) can apply. It allows relief from a final judgment, order, or proceeding for any other reason justifying relief. *Olle v. Henry & Wright Corp.*, 910 F.2d 357 (6th Cir. 1990).

As a general rule a party cannot use Rule 60(b)(6) to escape the consequences of a free, calculated, and deliberate choice of how to proceed in litigation. *Ackermann v. United States*, 340 U.S. 193, 198, 71 S.Ct. 209, 211-212, 95 L.Ed. 207 (1950). The facts of this case take it outside this general rule. The parties chose to try the

dischargeability question in state court, and that resulted in the closing of this proceeding without any action. However, because the state courts did not reach a decision under § 523(a)(5), both parties are legally free to obtain a decision by this court.

The courts have also said that relief under Rule 60(b)(6) requires proof of extraordinary circumstances. Rule 60(a) and Rule 60(b)(1)-(5) cover ordinary circumstances. The circumstances of this case are certainly out of the ordinary. The parties attempted to obtain a decision under § 523(a)(5) from the state courts. They thought they had a decision by the trial court, but the appeals court vacated the judgment because the trial court granted the wrong remedy. This left the parties with no decision by the state courts.

If the court refuses to re-open this proceeding, what will be the result? Either Mr. Tenpenny or Ms. Tenpenny can file a new complaint in this court or in trial court. Of course, re-opening this proceeding may prevent Mr. Tenpenny from attempting to try the case again in state court. The loss of this opportunity is not a compelling reason to refuse to re-open this proceeding. Neither party can rightfully blame the other for the failure to obtain a decision in the state courts. Even if it were the fault of Ms. Tenpenny, that would not be a good reason for forcing the parties to start over in the state courts. This court has jurisdiction; the law does not require this court to give either party another opportunity to try the issues in the state courts; in the present circumstances the court need not defer to the state courts in the interest of comity.

Likewise, the court is not concerned with whether either party could have obtained a decision in the state courts by asking the trial court to correct its order after the

appeals court reversed. The trial court's judgment was vacated and remains vacated.

Having failed to obtain a decision in the state courts, the parties are back to where they were when Ms. Tenpenny filed her complaint in this court. The only real question is whether to require Ms. Tenpenny to start completely over by filing a new complaint in this court or to allow her to re-open this proceeding. Requiring her to file a new complaint would amount to putting form over substance. Furthermore, Ms. Tenpenny is asking for relief from the order that closed this proceeding, and it was not a final decision on the merits. Balancing the need for finality against the need to do justice leads to only one result; this proceeding should be re-opened. *Brown v. Clark Equipment Co.*, 96 F.R.D. 166, 168 (D. Me. 1982). The court will enter an order re-opening this proceeding.

This memorandum constitutes the court's findings of fact and conclusions of law as required by *Fed. R. Bankr. P.* 7052.

At Chattanooga, Tennessee.

BY THE COURT

R. THOMAS STINNETT
UNITED STATES BANKRUPTCY JUDGE

[entered 3/4/96]

UNITED STATES BANKRUPTCY COURT
Eastern District of Tennessee
Winchester Division

In re

Harlan Delter Tenpenny

Debtor

Bankruptcy Case
No. 91-15035

Janie Tenpenny

Plaintiff

v.

Harlan Delter Tenpenny

Defendant

Adversary Proceeding
No. 92-1037

ORDER

In accordance with the Memorandum Opinion entered by the court,

It is ORDERED that this adversary proceeding be re-opened.

ENTER:

BY THE COURT

R. THOMAS STINNETT
U.S. BANKRUPTCY JUDGE

[entered 3/4/96]